NO. 2422.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. K. LOVE, United States Marshal,

Plaintiff in Error,

vs.

VASO PAVLOVICH,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

McGOWAN & CLARK,
Fairbanks, Alaska,
Attorneys for Appellant.

Filed this.....day of September, 1914.

....., *Clerk.*

By ....., *Deputy Clerk.*

NO. 2422.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

H. K. LOVE, United States Marshal,

Plaintiff in Error,

vs.

VASO PAVLOVICH,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR.

The Case.

This is an action commenced by Vaso Pavlovich against H. K. Love in his capacity as United States Marshal for the Fourth Division of the Territory of Alaska, for damages against said United States Marshal for selling certain wood claimed by said Pavlovich. The facts as they developed in the case are as follows:

Prior to May 17, 1912, Sam Vlik & Co., a copartnership composed of several Austrians, were mining on the Chatanika Flats, Fourth Judicial Division, Territory of Alaska, and on said day were indebted to Paul Ringseth, a merchant of Chatanika, in the sum of $1,000.00, and to Jack McLean, a laborer employed by them, in the

sum of $1,000.00, as well as to numerous other persons, including the plaintiff Pavlovich. On the evening of May 17, 1912, Paul Ringseth instituted an action in the Justice or Commissioner's Court for Fairbanks Precinct, at Chatanika, filed the necessary bond and had writ of attachment issued by the Commissioner, which, together with summons, was placed in the hands of Lysle Brown, a Deputy United States Marshal, for service. Brown went from the Commissioner's office to the claim where Vlik & Co. were engaged in mining, distant about a half mile, and there served the summons in the action upon Dan Vlik, one of the copartners, and also served him with a copy of the writ of attachment, and posted two or more notices of attachment on the claim (Tr. pp. 58-59-60). The defendant alleged that he posted notice of said attachment on a large pile of wood, which is the wood in controversy in this action. He also testified that he posted notices of attachment on a post close to the wood, and there was some testimony to the effect that another notice was posted on the ground. He appointed the plaintiff in that action, Paul Ringseth keeper (Tr. p. 65). Later on the same evening, Jack McLean, in the same court, instituted suit against Sam Vlik & Co. for the sum of $1,000.00, took out a writ of attachment, and placed same in the hands of Deputy Marshal Brown, who served it in the same manner (Tr. pp. 46-47-61).

On the night of May 17, Sam Vlik, a member of Vlik & Co., went to the cabin where Pavlovich was living and informed him that he wanted him to go to Fairbanks

with him in the morning, as he was going to give him a bill of sale of the wood on the claim (Tr. p. 29). They went to Fairbanks on the morning of the 18th, a bill of sale was prepared from Sam Vlik & Co. to Vaso Pavlovich, for a purported consideration of $2,000.00, and was recorded (Tr. pp. 22-24). This bill of sale was executed without the knowledge of the other members of the copartnership of Vlik & Co. (Tr. p. 45).

That said bill of sale given by Vlik & Co. to Pavlovich was intended as security for Pavlovich's claim, and any amount that the wood, covered by the bill of sale, sold for, in excess of the claim of said Pavlovich, was to be returned to Sam Vlik (Tr. p. 34).

Pavlovich claims to have put up, on the night of May 18, 1912, notices on the wood (Tr. p. 25), claiming same as his own, and to have measured it afterwards (Tr. pp. 25-34).

On May 24, judgment was secured in the Commissioner's Court, in the cases of Ringseth v. Vlik & Co. (Tr. p. 74), and McLean v. Vlik & Co. (Tr. p. 75). The record shows that the judgment was secured by default, but fails to show that the Justice or Commissioner waited one hour before entering judgment. The Justice also failed to enter judgment to foreclose the attachment lien theretofore secured.

Execution was issued in Ringseth v. Vlik & Co. on May 24, 1912 (Tr. p. 77), and on May 25, the wood in controversy was seized (Tr. p. 78), and thereafter, on June 6th, 1912, 123 cords of the wood was sold by the Marshal at public auction, and purchased by Paul Ring-

seth for the sum of $1,076.25 (Tr. pp. 89-90).

On June 12, 1912, an execution was issued in the case of McLean v. Vlik & Co. (Tr. p. 79), the Marshal levied upon the balance of the wood remaining on the claim, together with other personal property, and sold the same on the 25th day of June, 1912, to said Ringseth for $275.00 (Tr. pp. 88-89).

At the time of the first sale, Pavlovich was present with an interpreter and notified the Marshal that the wood was his (Tr. p. 27). Pavlovich was never in possession of the wood, except through posting notices after the same had been seized by the United States Marshal.

The plaintiff admits the seizure of three cords of wood, but denies the seizure of the wood in controversy (Tr. p. 16). The wood purchased by Ringseth under the first sale was 123 cords at $8.50 per cord, and under the second sale, under the McLean judgment, was 40 cords at substantially the same price.

On April 25, 1913, the cause being at issue, went to trial before the Hon. Frederic E. Fuller, sitting with a jury duly impaneled and sworn, and was thereafter continued from day to day until the close of the plaintiff's case, at which time the defendant moved for a non-suit and directed verdict (Tr. pp. 54-55-56), which motion was denied. The defendant proceeded with his defense, and after defendant had rested (Tr. p. 100), the plaintiff put in his case in rebuttal (Tr. pp. 100-105). After testimony had been closed, the defendant renewed his motion for an instructed verdict (Tr. pp. 105-106), which motion was by the Court denied (Tr. p. 106).

Thereafter arguments were had to the jury and the Court was requested by the defendant to submit to said jury certain instructions (Tr. pp. 107-115), a part of wihch the Court gave and a part of which the Court refused. The Court instructed the jury (Tr. pp. 117-127) and the defendant, in the manner prescribed by law and the rules of court, duly excepted to said instructions given by the Court (Tr. pp. 127-128), and excepted to the Court's refusal to give certain instructions offered by defendant (Tr. pp. 112-117). Thereafter the matter was submitted to the jury, and on April 29, 1913, the jury brought in a verdict in favor of plaintiff and against the defendant in the sum of $1,325.00 (Tr. p. 128).

Thereafter, and within the time prescribed by law, the defendant moved for a new trial (Tr. pp. 129-130-131), and on May 24, 1913, after argument heard by the Court, said motion was denied (Tr. p. 132), and on May 24, 1913, a judgment was regularly given, made and entered upon said verdict, in favor of the plaintiff and against the defendant, for the sum of $1,325.00 and costs (Tr. pp. 132-133). On November 12, 1913, the defendant presented to the court for settlement his bill of exceptions, and said bill of exceptions was on said day duly settled by the Court (Tr. pp. 135-136). Threafter, on January 16, 1914, a petition for writ of error was filed (Tr. pp. 142-143), together with assignments of error (Tr. pp. 144-158), and on January 16, 1914, an order was made allowing writ of error (Tr pp. 158-159). Writ of error and citation were issued on January 16, 1914 (Tr. pp. 159-162).

The plaintiff contends (1) that the bill of sale from Vlik & Co. to plaintiff, Vaso Pavlovich (defendant in error), dated May 18, 1912, was a valid transfer of the title to said property and that Vaso Pavlovich took possession of said property on the night of May 18, 1913, by posting notices on said property and by measuring same a few days subsequent thereto, and that the defendant H. K. Love, as United States Marshal, seized three cords only of the wood; (2) that the failure of the United States Commissioner at Chatanika to enter an order foreclosing the attachment liens of Paul Ringseth and Jack McLean in their judgments, deprived said Ringseth and McLean of any rights they acquired by reason of the attachment; (3) that the judgments under which the sale was made by the United States Marshal, in Ringseth v. Vlik & Co. and McLean v. Vlik & Co., were void for the reason that they did not show that said Commissioner waited for one hour after the time fixed for the return on the summons, before entering judgment, and that any sale under executions issued in said causes was void; (4) that even if the original attachments in said two cases had been regularly issued and levied on all of the wood, when the Commissioner, in entering judgment, failed to foreclose the attachment liens in the judgments entered, the possession taken by said Pavlovich, by posting notices on said wood, was automatically extended and took effect upon the moment of the rendering judgment in said causes, without foreclosing the attachment liens, and that an execution issued on said judgments, even if they were valid, would be ineffective

as against the possession of said Pavlovich, and that a sale under said executions would be a conversion of the property.

The defendant contends (1) that the alleged bill of sale to Pavlovich from Vlik & Co. was fraudulent and intended to hinder, delay and defraud other creditors of Vlik & Co.; (2) that it was not intended as a bill of sale, but was in reality a mortgage, and as it was not executed with the formalities prescribed by the laws of Alaska, was void because said Pavlovich did not enter into immediate possession of the property covered by said alleged bill of sale and did not continue in possession thereof; (3) that said transfer was made in trust for Vlik & Co.; (4) that the defendant had actually taken possession of all the wood in controversy and that a keeper was in charge thereof at the time Pavlovich attempted to take possession thereof and that Pavlovich never was in possession, either actual or constructively, of said wood; (5) that the defendant should have been permitted to prove by parol testimony that the Commissioner waited one hour, as prescribed by law, after the time designated as the return on said summons, in the cases of Ringseth v. Vlik & Co. and McLean v. Vlik & Co., before judgment was entered; (6) that even though the transfer to Pavlovich was a valid transfer, that by reason of his failure to take possession of the property in controversy, between the time the judgment was rendered in each of said cases and the time said property was seized under execution, said property was still subject to seizure and sale by the United States Marshal under the executions;

that plaintiff could not take constructive possession of the property, under the law, if the attachment lien had been lost (if it was lost) by virtue of having posted notices on the wood, at a time when the property was in the possession of the United States Marshal; (7) that plaintiff never was in possession of the property and that the rights acquired by attaching creditors, prior to the execution of the alleged bill of sale, were paramount to any rights obtained by the plaintiff, either as a mortgagee or as a purchaser of said wood from Vlik & Co.; (8) that the alleged bill of sale made by one member of a mining copartnership, without the concurrence of the other members thereof, did not pass such title to Pavlovich as to create any lien on the property or claim thereto by reason thereof; (9) that if said alleged bill of sale was in reality a mortgage, plaintiff had no title in the property covered thereby, to support an action for conversion, his only action being one in replevin to recover possession of the property.

The defendant relies upon the following assignment of error:

Assignment of Error.

I.

The Court erred in admitting, over defendant's objection, the testimony of the witness, Vaso Pavlovich, substantially as follows:

> (a) Prior to the 18th day of May, 1912, I furnished Sam Vlik & Co. with horse feed. I paid freight on five tons. I paid $80.00 for freight and

$362.75 for the feed. I gave Sam Vlik $110.00. (*Ex.* 1 *B. of E.*)

(b) Sam Vlik & Co. agreed to pay me for this feed and money that I paid. (*Ex.* 2 *B. of E.*)

(c) I posted four notices of that kind on the wood in dispute in this case. I divided these notices on four corners. I put them up on the 18th of May. (*Ex.* 3 *B. of E.*)

II.

The Court erred in overruling and denying the defendant's motion for a non-suit and a directed verdict. (*Ex.* 4 *B. of E.*)

III.

The Court erred in rejecting the evidence of the witness, Paul Ringseth, as to his attendance before the Commissioner at Chatanika during the trial of the action of Ringseth v. Sam Vlik & Co., which was sought to be introduced to show that the Commissioner waited over one hour before entering the judgment in that case, and in sustaining plaintiff's objection to the question:

Q. Did you attend before the Commissioner at Chatanika at the time that the summons was returned? (*Ex.* 5 *B. of E.*)

IV.

The Court erred in rejecting the evidence of the witness, Samuel R. Weiss, the Commissioner at Chatanika, as to the time of the rendition of the judgment in the case of Ringseth v. Vlik & Co., which was sought to be introduced for the purpose of showing that the judgment was not made or entered in said docket until after the hour of 3 p. m. on the 24th day of May, 1912, and that he waited one hour before entering judgment; and in

sustaining the objection of plaintiff that the docket was the best evidence and in refusing to allow said witness to answer the following question:

> Q. Referring to case No. 35, Paul Ringseth v. Sam Vlik & Co., and to page 501 of your docket, to the entry of May 24th, will you kindly state when that entry was made. (*Ex.* 6 *B. of E.*)

V.

The Court erred in denying defendant's offer to prove the matters set forth in the previous assignment of error and in instructing the jury not to consider the offer as testimony in the case. (*Ex.* 6 *B. of E.*)

VI.

The Court erred in denying the offer in connection with the case of Jack McLean v. Sam Vlik & Co., wherein defendant offered to prove that the docket entry of judgment in said case was not made or entered in said docket until after the hour of four p. m. of said 24th day of May, 1912, to which offer the plaintiff made the same objection, and thereupon the Court denied said offer and instructed the jury to disregard the same. (*Ex.* 7 *B. of E.*)

VII.

The Court erred in permitting the witness, Peter Vidovich, called in rebuttal, to answer the following questions, over the defendant's objections, to-wit:

> (a) "Q. I will ask you to state, Mr. Vidovich, whether at that time and place, and in the presence of you and Mr. Brown and Mr. Day, that Mr. Brown, referring to this matter, stated to you and Mr. Day in substance as follows: That you were talking about this attachment, and that Mr. Brown stated to Judge Day and to you in substance that he (Brown)

only attached the 3 or 3½ cords of wood, and that was the small pile and that was where he (Brown) placed his notices of attachment,—on the small pile; and that that small pile was all the wood that he (Brown) attached?" to which question the witness answered, "Yes, sir." (*Ex.* 8 *B. of E.*)

(b) "Q. Didn't Mr. Brown say to you, or to Judge Day in your presence at that time, that, when this case came to trial, that he would go on the witness stand and swear to that, that only 3½ cords of wood were attached by him?", to which question the witness answered, "He did say so." (*Ex.* 9 *B. of E.*)

VIII.

The Court erred in permitting the witness, H. A. Day, called in rebuttal, to answer the following question, over the objection of defendant, to-wit:

(a) "Q. Mr. Day, you may state to the jury whether or not, on the 19th day of May, 1912, you, in company with Mr. Peter Vidovich, went to the United States Marshal's office in Fairbanks, Alaska, and then and there had a conversation with Mr. Carlson, the Deputy United States Marshal, concerning the suit and the attachment therein, in the case of Paul Ringseth against Sam Vlik & Co., in the Commissioner's court at Chatanika, before Sam Weiss, justice of the peace,"

to which the witness answered:

"A. Yes, we were there, I wouldn't swear to the date positively, but it was about that time." (*Ex.* 10 *B of E.*)

(b) "Q. Mr. Day, I will ask you whether or not, in the presence of you and Mr. Peter Vidovich only, that Mr. Brown, United States Deputy Marshal, at that time in your office, some time during the summer on the date which he testified to, when you were talking about this particular case of Paul Ringseth v. Sam Vlik & Co. and the attachment

thereunder sued out in the case before Commissioner Weiss, of Chatanika, in the Fairbanks Precinct, whether or not Mr. Brown said to you in substance that he (Brown) only attached 3 or 3½ cords of wood under this attachment, and that that was the small pile of wood, and that that was the place,—on the small pile of wood,—where he (Brown) posted the notice of attachment, and that that was all the wood that he (Brown) attached in that suit. I will ask you whether or not that was the substance of what Mr. Brown said to you and Mr. Vidovich at that time and place."

to which the witness answered:

"A. He stated substantially that." (*Ex.* 11 *B. of E.*)

IX.

The Court erred in denying defendant's motion for instructed verdict, which motion was made by defendant after the testimony had closed. (*Ex.* 12 *B. of E.*)

X.

The Court erred in permitting the case to be submitted to the jury, over the defendant's objection and motion for a directed verdict.

XI.

The Court erred in refusing to instruct the jury, as requested by the defendant, in the following particulars:

(a) In refusing to give the following part of defendant's requested instruction No. II, as follows:

"or (2) the mortgage provide that the property may remain in the possession of the mortgagor, and be accompanied by an affidavit of all the parties thereto, to the effect that the same is made in good faith, to secure the amount named therein, and without

any design to hinder, delay, or defraud creditors, and be acknowledged and filed in the office of the Recorder of the Precinct in which the property is situate, and be indexed in the record of chattel mortgages, and the original thereof retained by the said Recorder for the examination of all persons who may be interested therein." (*Ex.* 13 *B. of E.*)

(b) in modifying defendant's requested instruction No. III by adding thereto the following words:

"or was prevented from so doing by the possession or acts of the defendant." (*Ex.* 14 *B. of E.*)

(c) In refusing to give defendant's requested instruction No. IV, which reads as follows:

"I instruct you that, if you find that said alleged bill of sale, offered by the plaintiff in this case, was, in reality, intended as a chattel mortgage, and was not filed and indexed as such in the office of the Recorder, as required by law, then such mortgage is void and of no effect." (*Ex.* 15 *B. of E.*)

(d) In refusing to give defendant's requested instruction No. VI, which reads as follows:

"I instruct you that, in order for the plaintiff in this action to have acquired possession of the wood in controversy, after the entry of the judgments in the cases of Ringseth v. Vlik & Co., and McLean v. Vlik & Co., on the 24th day of May, 1912, it was necessary for him to take such actual possession thereof as would be notice to the world, and to this defendant in particular, that he was claiming and asserting a claim thereto, and, if you find that the plaintiff did not take such possession, between the time of the rendition of such judgments on the 24th day of May, 1912, and prior to the levy of the execution issued out of the Commissioner's Court at Chatanika, in the cases above mentioned, then the lien of said judgments, acquired by the levy of such executions,

is paramount and superior to any possession claimed by the plaintiff in this action, and the United States Marshal had the right to sell the property under the writs of execution in those cases." (*Ex.* 16 *B. of E.*)

(e) In refusing to give defendant's requested instruction No. VII, which reads as follows:

"You are instructed that, if at the time when the defendant levied the executions above mentioned, on the wood in controversy herein, the plaintiff herein was not in the actual possession of said wood, then the levy on said execution was properly made, and the defendant was entitled to hold said property thereunder. (*Ex.* 17 *B. of E.*)

(f) In refusing to give that portion of defendant's requested instruction No. VIII, which reads as follows:

"And if you believe, from the evidence in this case, that the alleged bill of sale, offered by the plaintiff, was made by Sam Vlik & Co. to the plaintiff with the understanding that the same was made for the purpose of protecting the plaintiff, as against other creditors of Sam Vlik & Co., then I instruct you that the said transfer was fraudulent as against the plaintiffs in said actions, namely, as against Paul Ringseth and Jack McLean, and, if you so find, then your verdict in this action should be for the defendant. (*Ex.* 18 *B. of E.*)

(g) In refusing to give defendant's requested instruction No. IX, which reads as follows:

"You are further instructed that every conveyance or assignment in writing, or otherwise, of any interest in lands or things in action, or any rents or profits issuing therefrom, and every charge on lands, goods, or things in action, or on the rents or profits thereof, made by any person with intent to hinder, delay, or defraud creditors, or other persons, of their lawful suits, demands, debts or damages, as against

the persons so hindered, delayed, or defrauded, is void, and if you find, from the evidence in this case, that Sam Vlik & Co. executed the bill of sale produced by plaintiff in this action with such intent, then your verdict should be for the defendant." (*Ex.* 19 *B. of E.*)

(h) In refusing to give defendant's requested instruction No. X, which reads as follows:

"You are further instructed that, if you find, from the evidence in this case, that the defendant was in the lawful possesion of the wood in controversy, under and by virtue of the writs of attachment mentioned herein, from the 17th day of May, 1912, up to and including the 24th day of May, 1912, then, even though the attachment may have expired by operation of law, the possession was that of the defendant until said date, and if the plaintiff did not either enter into possession or take possession of said wood on or before the 25th day of May, 1912, when the execution in the case of Ringseth v. Vlik & Co. was levied, then the wood in controversy was in the legal possession of the United States Marshal, as alleged in defendant's answer herein." (*Ex.* 20 *B. of E.*)

(i) In refusing to give defendant's requested instruction No. XI, which reads as follows:

"You are instructed that the judgments in the cases of Ringseth v. Sam Vlik & Co., and McLean v. Sam Vlik & Co. are valid judgments for the purposes of this case, and are binding on the plaintiff, and that the executions issued thereunder and said judgments kept in force the attachments in said actions, and the property levied on thereunder was at all times subject to the executions issued in said actions, and the plaintiff in said actions, by virtue of said attachments, had valid liens on the wood in controversy, from the 18th day of May, 1912, until

the time when the said property was sold under the executions issued therein." (*Ex.* 21 *B. of E.*)

(j) In refusing to give defendant's requested instruction No. XII, which reads as follows:

"You are instructed that the attachment liens of Ringseth v. Vlik & Co., and McLean v. Vlik & Co. were not lost, destroyed, waived, or abandoned by the plaintiff in said actions, by reason of the failure of the Commissioner, in whose Court said actions were pending, to insert in said judgments an order foreclosing said liens, and that the words 'Let execution issue' were a sufficient order of foreclosure." (*Ex.* 22 *B. of E.*)

(k) In modifying defendant's requested instruction No. XIII, by inserting the following words:

"And if you also find that the plaintiff had previous knowledge of the fraudulent intent of Vlik & Co." (*Ex.* 23 *B. of E.*)

(l) In refusing to give defendant's requested instruction No. XIV, which reads as follows:

"You are instructed that, if you find from the evidence that said alleged bill of sale, given to the plaintiff in this action on the 18th day of May, 1912, was in reality a chattel mortgage, and that said plaintiff actually took possession of said property under said said chattel mortgage, and actually held possession thereof, when said property was taken under the executions by the defendant in this action, in the cases of Ringseth v. Vlik & Co., and McLean v. Vlik & Co., you can not, under any circumstances, find a verdict in favor of the plaintiff in this action for a greater sum than the amount of the indebtedness which said alleged mortgage was given to secure; and, if you find the foregoing facts to be true, you can not, under any consideration, find for said plaintiff in a sum greater than the actual

market value of the wood so seized by the defendant, as proved by the evidence in this case." (*Ex.* 24 *B. of E.*)

(m) In refusing to give defendant's requested instruction No. XVI, which reads as follows:

"You are further instructed that the evidence in this case conclusively shows that Paul Ringseth and Jack McLean are judgment creditors of Sam Vlik & Co., and that, if the bill of sale offered by the plaintiff was made for the purpose of hindering and delaying them in the collection of their just debts and demands, then your verdict must be in favor of the defendant." (*Ex.* 25 *B. of E.*)

(n) In refusing to give defendant's requested instruction No. XVII, which reads as follows:

"You are instructed that, if you should find, from the evidence, that the possession of the defendant under the attachment liens above referred to was lost by the failure of the defendant to have the attachment foreclosed in the judgments above mentioned, and that thereafter the defendant acquired a valid lien under the executions hereinbefore mentioned, then his possession, so obtained, would be valid, unless the plaintiff had actual possession and control of said personal property." (*Ex.* 26 *B. of E.*)

to all of which rulings, the defendant excepted.

XII.

The Court erred in instructing the jury in the following particulars:

(a) In instructing the jury as set forth in instruction No. IX, which reads as follows:

"And, if you find from the evidence in this case that the bill of sale offered by the plaintiff was intended as a chattel mortgage, then I instruct you that the said mortgage is void as to prior creditors

in good faith for value, unless the plaintiff in the action entered into the actual possession of such property and retained possession thereof, or unless you find that he was prevented from so doing by the possession or acts of the defendant." (*Ex.* 27 *B. of E.*)

(b) In instructing the jury as set forth in instruction No. XI, which reads as follows:

"You are instructed that where absolute ownership is claimed and only special property in the thing claimed is shown—as would be the case if the plaintiff instead of showing absolute ownership should show a conditional sale, or this bill of sale operated as a chattel mortgage—that that is sufficient to sustain a recovery, provided that it also appear that the plaintiff has the right of immediate possession of the property." (*Ex.* 28 *B. of E.*)

(c) In instructing the jury as set forth in instruction No. XII, which reads as follows:

"You are instructed that property may be sold or mortgaged subject to the lien of an attachment, and the sale or mortgage becomes absolute when the lien of the attachment is removed or lost." (*Ex.* 29 *B. of E.*)

(d) In instructing the jury as set forth in instruction No. XIII, which reads as follows:

"You are instructed that the judgments given in the Commissioner's Court at Chatanika on May 24, 1912, that have been introduced in evidence in this case, did not contain any order that the property attached theretofore in the actions in which said judgments were given should be sold to satisfy the demands of the plaintiffs in said actions, and that therefore as a matter of law said plaintiffs waived and lost any lien theretofore secured upon the property in question by reason of the attachments there-

tofore issued in said actions, and that the defendant was not therefore longer entitled to the possession of said property under said writs of attachment, if you should find that they had been theretofore duly levied." (*Ex.* 30 *B. of E.*)

(e) In instructing the jury as set forth in instruction No. XIV, which reads as follows:

"And you are further instructed that if you find that the plaintiff had become the owner of said wood and entitled to the immediate possession thereof prior to the date of the levy thereon by the defendant under the writs of execution (evidence of which has been given before you), by reason of the bill of sale to the plaintiff from Sam Vlik & Company, then the defendant was without right to hold such property under such levies, or to sell or dispose of the same." (*Ex.* 31 *B. of E.*)

(f) In instructing the jury as set forth in instruction No. XV, which reads as follows:

"You are instructed that if you find by a preponderance of evidence that on May 18th, 1912, Sam Vlik & Company was indebted to the plaintiff in the sum of seventeen hundred and twenty dollars, or any other substantial sum, and, that in consideration of such indebtedness, and without intent to hinder, delay or defraud the creditors of said Vlik & Company, or without previous knowledge of such intent on the part of the plaintiff, then executed and delivered to the plaintiff the bill of sale of said property; and, if you further find by a preponderance of evidence that the plaintiff thereupon acquired the right to the immediate possession of said property, and that plaintiff did on or about May 18, or at any time before the levy of the executions herein mentioned, take possession of said wood, or notify the defendant of his claim of ownership and right of possession thereof, or that the defendant was otherwise

notified of such ownership and right of possession, then you are instructed that the levy or attempted levy under such writs of execution was without authority, and that the defendant did not thereby secure any right to hold such wood under such levy, or to sell the same thereunder." (*Ex.* 32 *B. of E.*)

(g) In giving that part of instruction No. XVI which reads as follows:

"Provided that you further find that the plaintiff had previous knowledge of the fraudulent intent of said Vlik & Company." (*Ex.* 33 *B. of E.*)

(h) In giving that part of instruction No. XIX which reads as follows:

"And if you also find that the plaintiff had previous knowledge of the fraudulent intent of Vlik & Company." (*Ex.* 34 *B. of E.*)

(i) In instructing the jury as set forth in instruction No XX, which reads as follows:

"You are instructed that if you find from the evidence that said alleged bill of sale given to plaintiff in this action on the 18th day of May, 1912, was in reality a chattel mortgage, and that the plaintiff actually took possession of the property under said chattel mortgage and actually held possession thereof when said property was taken under execution by the defendant in this action in the case of Paul Ringseth v. Sam Vlik and Company and Jack McLean v. Sam Vlik & Company, you can not under such circumstances find a verdict in favor of the plaintiff in this action for a greater sum than the amount which said alleged mortgage was given to secure; and, if you find the foregoing facts to be true, you can not under any circumstances find for the plaintiff in a sum greater than the actual market value of the wood so seized by defendant at the time and place of such seizure as proved by the evidence in this case." (*Ex.* 35. *B. of E.*)

Argument.

Section 550, Compiled Laws of Alaska, provides as follows:

> "Sec. 550. All deeds of gift, all conveyances, and transfers of assignments, verbal or written, of goods and chattels or things in action, made in trust for the person making the same, shall be void as against the creditors, existing or subsequent, of such person."

Section 556, Compiled Laws of Alaska, provides as follows:

> "Sec. 556. Every conveyance or assignment, in writing or otherwise, of any estate or interest in lands, or in goods, or things in action, or of any rents or profits issuing therefrom, and every charge upon lands, goods, or things in action, or upon the rents or profits thereof, made with the intent to hinder, delay, or defraud creditors or other persons of their lawful suits, damages, forfeitures, debts, or demands, and every bond or other evidence of debt given, action commenced, decree or judgment suffered, with the like intent, as against the persons so hindered, delayed, or defrauded shall be void."

Section 1875, Compiled Laws of Alaska, provides as follows:

> "Sec. 1875. Every sale or assignment of personal property, unless accompanied by the immediate delivery and the actual and continued change of possession of the thing sold or assigned, shall be presumed prima facie to be a fraud against the creditors of the vendor or assignor, and subsequent purchasers in good faith and for a valuable consideration, during the time such property remains in the possession of said vendor or assignor."

Section 740, Compiled Laws of Alaska, provides as follows:

"Sec. 740. A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith for value, unless—

"(1) The possession of such property be delivered to and retained by the mortgagee; or

"(2) The mortgage provide that the property may remain in the possession of the mortgagor and be accompanied by an affidavit of all the parties thereto, or, in case any party is absent from the precinct when such mortgage is executed, at the time of the execution thereof, an affidavit of those present and of the agent or attorney in fact of such absent party that the same is made in good faith to secure the amount named therein, and without any design to hinder, delay, or defraud creditors, and be acknowledged and filed as hereinafter provided."

Section 741, Compiled Laws of Alaska, provides as follows:

"Sec. 741. Subject to the provisions of the next preceding section, one member of a firm of general partners may alone execute a mortgage of personal property and make the affidavit therein required on behalf of the firm, and the mortgage so executed and the affidavit so made is as valid as if executed and made by all the partners or their agent or attorney in fact. In case of a corporation the president, secretary, or managing agent thereof may make the affidavit on its behalf."

Section 743, Compiled Laws of Alaska, provides as follows:

"Sec. 743. Every mortgage of personal property, together with the affidavits of the parties thereto or a copy thereof, certified to be correct by the person before whom the acknowledgment has been made, must be filed in the office of the recorder of the precinct where the mortgagor resides, and of the pre-

cinct where the property is at the time of the execution of the mortgage, or, in case he is not a resident of the district, then in the office of the recorder of the precinct where the property is at the time of the execution of the mortgage; and the recorder must, on receipt of such mortgage or copy, indorse thereon the time of receiving the same, and file and keep the same in his office for the inspection of all persons, and shall enter in a book, properly ruled and kept for that purpose, the names of all the parties—the names of the mortgagors to be alphabetically arranged,—the consideration thereof, the date of its maturity, and the time of filing the same."

Section 746, Compiled Laws of Alaska, provides as follows:

"Sec. 746. Personal property mortgaged may be taken on attachment or execution issued at the action of a creditor of the mortgagor; but before the property is so taken the officer must pay or tender to the mortgagee or the assignee thereof the amount of the mortgage debt and interest, or must deposit the amount thereof with the recorder of the precinct in which the mortgage is filed, payable to the order of the mortgagee or the assignee thereof; and when the property then taken is sold under process the officer must apply the proceeds of the sale as follows:

"(1) To the repayment of the sum paid to the mortgagee or the assignee of said mortgage, with interest from the date of such payment; and

"(2) The balance, if any, in like manner as the proceeds of sale under execution are applied in other cases."

Section 748, Compiled Laws of Alaska, provides as follows:

"Sec. 748. The provisions of the foregoing sec-

tions of this chapter shall extend to all such bills of sale, deeds of trust, and other conveyances of goods, chattels, or personal property as shall have the effect of a mortgage or lien upon such property."

Sec. 972, Compiled Laws of Alaska, provides as follows:

"Sec. 972. The marshal or deputy marshal to whom the writ is delivered shall execute the same without delay, as follows:

"First. Real property shall be attached by leaving with the occupant thereof, or if there be no occupant, in a conspicuous place thereon, a copy of the writ certified by the marshal.

"Second. Personal property capable of manual delivery to the marshal, and not in the possession of a third person, shall be attached by taking it into his custody.

"Third. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having possession of the same, or if it be a debt, then with the debtor, or if it be rights or shares in the stock of an association or corporation, or interest or profits thereof, then with such person or officer of such association or corporation as this code authorizes a summons to be served upon."

I.

THE ALLEGED TRANSFER BY SAM VLIK & CO. IN BEHALF OF VLIK & CO. WAS A VOLUNTARY TRANSFER, WITH A SECRET RESERVATION IN FAVOR OF THE GRANTOR, MADE WITHOUT THE KNOWLEDGE AND CONSENT OF ALL THE COPARTNERS, AND CREATED NO LIEN AS AGAINST A PRIOR OR SUBSEQUENT ATTACHING OR EXECUTION CREDITOR.

See Wilcox et al. v. Jackson, 4 Pac., 966 (971-976).

(a) Sam Vlik alone executed the alleged bill of

sale (Plaintiff's Exhibit A, Tr. pp. 22-24), without the knowledge or consent of his copartner Dan Vlik (Tr. p. 45), and without the consent and probably without the knowledge of his copartner Mike Onak (Tr. p. 38), who first says that he first heard of the bill of sale on the night of May 18, 1912, and afterwards, that Sam Vlik told him on the night of the 17th of May, 1912, that he intended to make the bill of sale. Both members of the copartnership were working at the time.

(b) A secret trust in favor of transferer was reserved (Tr. p. 32).

(c) Transferee knew that he was securing a preference and that Vlik & Co. were insolvent (Tr. p. 32).

(d) The pretended transfer was of practically all the copartnership property, and broke up their operations.

> "There is no small difficulty," says Mr. Justice Story, "in supporting the doctrine, even under qualifications, that one partner may make a general assignment of all the partnership property, so as to break up its operations."
>
> Story on Partnership, Sec. 101;
> See also 30 Cyc., 495 (iv);
> Osborne v. Barge, 29 Fed., 725.

Sam Vlik & Co. were a mining copartnership and the selling of their principal, and practically only, asset could not by any stretch of the imagination be treated as the performance of an act within the usual scope of the firm business.

For authority of one member of the partnership to dispose of practically all the firm property, see:

> 2 Kent's Com., 14th ed., p. 60 (*page 46);
> 30 Cyc., 495;
> George on Partnership, pp. 213-214.

II.

THE ATTACHMENT LEVIED BY THE DEFENDANT UNITED STATES MARSHAL WAS A VALID LEVY, AND THE WOOD IN CONTROVERSY WAS IN HIS POSSESSION AS UNITED STATES MARSHAL AT THE TIME THE ALLEGED BILL OF SALE WAS EXECUTED, AND PLAINTIFF ALLEGES THAT HE TOOK POSSESSION OF THE WOOD AND PLAINTIFF COULD NOT ACQUIRE POSSESSION THEREOF.

The actions of Ringseth v. Vlik & Co. and McLean v. Vlik & Co. were both instituted before midnight of May 17, 1912, and the alleged bill of sale was not executed until between 10 a. m. and 11 a. m. on May 18, 1912, and the plaintiff made no attempt to take possession of the wood until the night of May 18, 1912, after the two attachments above mentioned had been levied.

Subdivision 3, Section 972, Compiled Laws of Alaska, supra, sets forth explicitly how bulky articles shall be attached, and is as follows:

> "Third. Other personal property shall be attached by leaving a certified copy of the writ, and a notice specifying the property attached, with the person having possession of the same," etc.

It is undisputed that Deputy Marshal Brown served writs of attachment upon and delivered copies thereof to Dan Vlik, a member of the firm of Vlik & Co., who was on the ground and in possession of the wood, thus complying with the section last quoted. Plaintiff by his pleadings admits a valid seizure of *three* cords of wood, so the statement of Brown that he posted notices of attachment must be taken as true, and his statement that

he set forth in his notices that he attached *200 cords more or less* is not disputed. He placed Ringseth, who lived near the wood and in sight thereof, in charge as keeper (Tr. p. 65), and the keeper visited the wood every day and delegated to McLean some authority and had McLean, who was on the ground at the time, watch the wood.

In discussing the manner in which a levy of attachment should be made, Mr. Shinn, in Volume 1 of his work on Attachment and Garnishment, at page 391, says:

> "To make a valid and effective levy as against subsequent attaching creditors, the general rule of law founded upon the principles of evidence and policy, requires a change of possession and the actual removal of the property attached, but where the removal would be attended with great waste and expense, it may be dispensed with. The officer must, in such case, exercise due vigilance to prevent it from going out of his control, although it is not necessary that there should be a continual presence of himself or his agent with the property. * * * To constitute a valid operative levy, the officer should do such act as to amount to a change of possession, or be equivalent to a claim of dominion, coupled with a power to exercise it. He must obtain actual control with power to remove it. The possession acquired and maintained and the custody and control exercised must be such as will give timely and unequivocal notice thereof. And if this be done it will be sufficient, without a manual taking of the property."
>
> "If the articles are so ponderous as not to be susceptible of removal conveniently, many statutes require that the officer or his agent must not only continue to exert control over it, but that some notice must be posted or filed or recorded, or that a

copy of the writ of attachment must be left or filed with a specified officer, such act being considered by the statute sufficient to give constructive notice to third persons of the levy made thereon." (Id. 403.)

See Sec. 972 Comp. Laws of Alaska.

"He (U. S. Marshal) may employ an agent or a receiptor for this purpose (retaining possession), whose possession will be the possession of the officer * * *. If he leave them in the possession of some one (other than the debtor) who acts for him, it will be sufficient, the purpose being to give notoriety to the attachment." (Id. 508.)

The defendant in the case at bar had the right to appoint the plaintiff in the action as custodian of the property.

Shinn on Attachment, Volume 1, Page 511, says:

"There seems to be no objection to making the attaching creditor a keeper of the property if he is a responsible man and willing to undertake the trust. And no fraud will be presumed thereby. Such plaintiff, however, holds possession as a servant of the officer, and not in his own right, for he has no right to control the possession of attached property during the pendency of the attachment."

In discussing the force of such a lien, Mr. Shinn says:

"The defendant cannot impair the attaching creditor's lien by divesting himself of the property; nor can the subsequent rights acquired by third persons affect it in any way." (Id. 617.)

III.

THE PLAINTIFF PAVLOVICH WAS NEVER IN POSSESSION OF THE WOOD IN CONTROVERSY AND DID NOT ACQUIRE OR EXERCISE DOMINION OVER OR CONTROL THEREOF CONTINUOUSLY, OR AT ALL, AND HIS ALLEGED ACTS OF TAKING POSSESSION WERE NOT EFFECTIVE AS AGAINST SUBSEQUENT ATTACHING OR EXECUTION CREDITORS.

The only acts alleged to have been performed by plaintiff in asserting ownership over the wood in controversy were the alleged posting of notices thereon on May 18, 1912, and the measuring of the wood a few days later, at which times the wood was in the custody and control of the defendant United States Marshal, and during all of which time two members of the firm of Vlik & Co. were still on the ground, occupying the buildings thereon (Tr. pp. 51-52), and the United States Marshal's notices remained posted on the wood and a keeper was in charge thereof.

The recording of a bill of sale of the property is ineffective for any purpose whatsoever, as there is no law in Alaska for the recording of a bill of sale of personal property, as the only evidence of change of title, so far as third persons are concerned, is the immediate and continuous actual change of possession.

See Allan v. Steiger, 31 Pac., 226-227;

Guthrie v. Carney (Cal.), 124 Pac., 1045.

In the case last cited, the Court, on page 1048, says:

> "Immediate delivery was imperatively necessary under the statute in order to constitute a sale which would be valid in the eyes of the law and protected

from the claims of creditors. This is so, even though the creditors had acquired no rights by attachment or execution previous to a delivery which may have been actual, but which did not immediately follow the sale."

Citing Howe v. Johnson (Cal.), 40 Pac., 42;

Ruggles v. Cannedy (Cal.), 53 Pac., 911.

In the case at bar, if Pavlovich had taken *constructive* possession of the property and was *constructively* in possession thereof continuously from the time of such sale until the execution was levied (conceding for the sake of argument that the attachment lien was lost by failure to foreclose same by judgment), then the levy of the execution by the United States Marshal was valid.

"The purchaser must take actual, open and unequivocal possession, which must be continuous and substantial; the word 'actual' excluding the idea of a mere formal change of possession, and the word 'continued' excluding the idea of a mere temporary change."

Taylor v. Malta Mercantile Co. (Mont)., 132 Pac., 550;

Dodge v. Jones (Mont.), 14 Pac., 707;

Stevens v. Erwin, 15 Cal., 503.

The bill of sale to Pavlovich not being notice to the defendant United States Marshal of any change of title, and no possession having been taken or maintained by Pavlovich, the execution levied by the defendant United States Marshal was valid, even though he might have known of the claim of Pavlovich, of which fact no evidence appears.

Allan v. Steiger, supra.

There is no evidence showing that the United States Marshal ever had any notice of the claim of Pavlovich until after the levy of the execution or prior to the date of sale. Hence, the levy was valid.

Ray v. Raynolds (Cal), 9 Pac., 15.

If Pavlovich posted the notices alleged by him to have been posted, and by virtue thereof acquired any possession of the property, it was a concurrent or joint possession with the vendor (if the United States Marshal's possession, by virtue of his attachment, was entirely ignored), and such concurrent or joint possession is void.

Bassinger v. Spangler (Colo.), 10 Pac., 809;

Cook v. Mann, 6 Colo., 21;

Donovan v. Gathe (Colo.), 32 Pac., 436;

Atchison v. Graham (Colo.), 23 Pac., 876-877.

In the case last cited, the Court says, on page 879:

> "To satisfy the statute, the possession of the vendee or mortgagee after default must be exclusive. He must exercise exclusive dominion and control over the property. Such dominion cannot be shared with the vendor or mortgagor. If the property is capable of manual delivery, it must be removed and taken from the possession of the vendor, or it must be so dealt with as to give notice to the community that there has been a change of ownership. If, to accomplish this end and satisfy the statute, it is necessary to remove the property from the place where it has been kept, such removal must be made, however great the expense or hardship may be. The change of possession must not only be actual, as between the parties, but apparent to the community."

In the case at bar no effort was made by Pavlovich to remove the wood from the ground, or to secure the pos-

session thereof from the United States Marshal or his keeper.

On the general question as to what constitutes a sufficient delivery of personal property to satisfy the statute, see:

Sweeney v. Coe et al., (Colo.), 21 Pac., 705;

Austin et al. v. Terry (Colo.), 88 Pac., 189-190, and cases there cited;

Springer v. Kreuger (Colo.), 34 Pac., 269-271, and cases there cited.

IV.

PAVLOVICH KNEW THAT THE ALLEGED TRANSFER TO HIMSELF FROM SAM VLIK WAS MADE FOR THE PURPOSE OF HINDERING AND DEFRAUDING THE OTHER CREDITORS OF SAM VLIK & CO., AND SAID TRANSFER WAS VOID, EVEN THOUGH A FULL CONSIDERATION HAD BEEN PAID FOR THE PROPERTY SO ATTEMPTED TO BE CONVEYED.

Helm v. Brewster, (Colo.), 93 Pac., 1101.

In the case last cited, the Court says:

> "The sale of property, though for a full consideration, made by the owner with intent to hinder, delay and defraud his creditors, if the vendee participated in such intent, is void as against such creditors. A grantor's intent to hinder, delay and defraud his creditors may be inferred from facts and circumstances."

The testimony shows that Pavlovich knew that Vlik & Co. were having financial difficulties and would not be able to go ahead with their mining, and, as he is presumed to be possessed of ordinary intelligence, knew that the

transfer of the wood to him would be a transfer of practically the only available asset from which the creditors of Vlik & Co. could realize anything in satisfaction of their claims. Consequently, he accepted the transfer with the knowledge that it would hinder and delay Vlik & Co.'s creditors.

V.

THE DEFENDANT WAS ENTITLED TO INTRODUCE EVIDENCE TO SHOW THAT THE JUDGMENTS OBTAINED IN THE CASES OF RINGSETH V. VLIK & CO. AND McLEAN V. VLIK & CO. WERE NOT ENTERED UNTIL ONE HOUR AFTER THE TIME DEFENDANTS WERE CITED TO APPEAR IN COURT.

Counsel realizes that it is not necessary to pass upon the question presented by the exception taken to the Court's ruling on the matter presented under this head, as the judgment was admitted in evidence without that proof, on the ground that it was not subject to collateral attack. But it is respectfully urged that the ruling of the Court on the question involved would be appreciated by the Bench and Bar of Alaska, where the matter has been often presented in the past, and doubtless will be frequently presented in the future, owing to the fact that many of the Commissioners and ex-officio Justices of the Peace are not lawyers, and are far removed from the larger towns, where they might receive some legal advice in the matter—where they err through ignorance of the form, but are correct in principle. And it is submitted that in the case at Bar that the chief difficulty has

arisen over the unintentional omission by the Commissioner from his judgment of the words necessary to foreclose the attachment lien.

VI.

THE COURT SHOULD HAVE DIRECTED A VERDICT IN FAVOR OF THE DEENDANT UNITED STATES MARSHAL AT THE CLOSE OF THE CASE, AS REQUESTED BY THE DEFENDANT.

See Israel, U. S. Marshal, v. Day (Colo.), 92 Pac., 698.

The alleged sale was fraudulent by reason of the fact, among others, that a secret trust was reserved in favor of the vendor, Sam Vlik & Co. (Tr. p. 34).

Comp. Laws of Alaska, Sec. 550.

The alleged bill of sale was not valid as a mortgage of chattels, as provided in Section 740 of the Compiled Laws of Alaska, for the reason (1) that there was no affidavit of merits, nor provision for the retention of possession by mortgagor, nor filing as a chattel mortgage; and (2) there was not a *delivery* of possession by the vendor and a continuous actual change of possession, for delivery of possession to vendee was impossible, the United States Marshal being in possession, and as far as the community was concerned, two members of the vendor copartnership remained in possession of the ground where the wood was piled, and there was no visible or actual change of possession apparent to the community.

See Israel, U. S. Marshal, v. Day, supra, p. 699.

A general creditor is not estopped from attaching prop-

erty covered by a chattel mortgage, which has not been duly filed, even though he had actual knowledge of the existence of such mortgage.

Greenville National Bank v. Evans-Snider-Buel Co., (Okla.), 60 Pac., 249.

VII.

THE INSTRUCTIONS PROPOSED BY THE DEFENDANT AND REJECTED BY THE COURT SHOULD HAVE BEEN GIVEN.

It is respectfully submitted that defendant's proposed instructions VI (Tr. p. 149); VII (Tr. p. 150); X (Tr. p. 151), and XVII (Tr. p. 154) correctly set forth the law applicable to the rights of the defendant United States Marshal in the case at bar.

Also that the modification of defendant's proposed instruction III (Tr. pp. 109-149) was erroneous, as it ignores the right of the defendant to take possession under a valid attachment prior to any assertion of title by the plaintiff.

We further respectfully submit that defendant's proposed instructions on the substantive law (e), (f), (g), (l) (Tr. pp. 149-154), should have been given, and the modifications to the instructions asked were erroneous.

VIII.

THE INSTRUCTIONS GIVEN BY THE COURT WERE IN PART ERRONEOUS OR MISLEADING.

Instruction IX (Tr. p. 154) in effect holds that the defendant United States Marshal could secure no pos-

session paramount to the rights of mortgagee, contrary to the rule that the attachment levied on mortgagor's property prior to recording of mortgage, without knowledge, is superior to rights of mortgagee.

Instruction XI (Tr. p. 155) is erroneous and misleading when applied to a case of conversion, and if proper at all would be more appropriate in a replevin action.

Instruction XIII (Tr. pp. 121; 155) is misleading, for while the United States Marshal might have no rights under the attachment writ, he might secure possession under a valid execution writ.

Instructions XII (Tr. p. 155) and XIV (Tr. p. 156) are misleading, as neither one takes into consideration the essential elements of a valid sale of personalty in Alaska, to-wit, the *actual and continued change of possession* and the further requisite that the possession must be *open and notorious*, and the mere *right* of possession is not sufficient.

See cases cited under Par. III, this brief.

Instruction XV (Tr. p. 156), is in conflict with the direct provisions of Secs. 740, 746 and 1875, Comp. Laws of Alaska, Supra., making an *inchoate right of possession* the *only requisite* to the securing of a title *superior to the rights acquired by attaching creditors in ignorance of the existence thereof.*

Modification of Instruction XVI (Tr. pp. 122; 157) by addition of the last three lines thereto, is misleading, as it fails to recognize the rights acquired by the attaching creditors before the alleged transfer was made, and

in effect holds that under no considerations could the Marshal be justified in attaching the property of the grantor.

Instruction XIX (Tr. pp. 123; 157) is erroneous, for the Court, by the addition of the last three lines, absolutely nullifies the balance of the instruction and it is directly opposed to provisions of Sec. 1875, Comp. Laws of Alaska. Supra.

The instruction, down to the last three lines, correctly describes a fraudulent conveyance without possession taken by vendee, leaving the property open to attachment by vendor's creditors, and then the instruction wipes out the previous instruction and makes the matter entirely depedent upon the knowledge by vendee of fraudulent intent of vendor.

In the case at bar, the defendant as a United States Marshal in and for the Fourth Division of the Territory of Alaska, in fulfillment of his duties imposed by law, under two writs of attachment issued out of a Justice Court, attached certain property and held possession thereof in the manner required by the statutes of Alaska. Through no fault or error on his part, the Justice of Peace, before whom the cases were tried, failed to foreclose the attachment lien when judgment was entered by default. The United States Marshal thereafter, under writs of execution issued in said cases, seized and sold the property in due course, and there is no objection made to his method of so doing.

The wood was purchased by the judgment cred-

itor. The plaintiff, at the time of the sale, notified creditor. The plaintiff, at the time of the sale, notified the Marshal that he claimed the wood, but made no attempt before that time to give notice to the Marshal that he had any claim in or to any part of it. He did not institute an action in replevin to recover the property, which counsel contends was his remedy, but relying upon the bond given by the United States Marshal, now attempts to mulct the United States Marshal in damages by reason of the performance of his duties as imposed by law. If plaintiff was the owner of the wood, his rights therein could have been determined by an ordinary action of replevin, which would have held the wood itself, and the rights of the parties could have been fully adjudicated therein without compelling the United States Marshal to go to the expense of defending an official act, performed in the due course of business.

It is respectfully suggested that from the evidence it clearly appears that Sam Vlik entered into some sort of an understanding with his fellow-countryman, Pavlovich, whereby Pavlovich would pose as the real owner of the wood and should sell same and return at least a part of the funds realized therefrom, not to the partnership itself, but to Sam Vlik individually, who, immediately after making the alleged transfer, disappeared from the scene and returned to Russia, where he doubtless feels safe from any pursuit by his creditors. It also appears from the evidence that a cleanup was had on the mine operated by Sam Vlik & Co. on May 17, and it is only reasonable to presume that, as the creditors were not

paid, the cleanup of gold dust departed in company with Sam Vlik. It is therefore submitted that, from all the evidence, the Court should have granted the motion made by the defendant for a directed verdict, for plaintiff's position as a *bona fide* purchaser for value is not sustained by the evidence, but, on the contrary, it is obvious from the evidence that it was a part of Sam Vlik's scheme to defraud his creditors. Furthermore, the alleged bill of sale was not intended to fully transfer the title to the property, but to reserve a secret trust for Sam Vlik, and if it was treated as a mortgage, it is void for want of proper execution and recording, and failure on the part of Vlik & Co. to deliver possession to the mortgagee of the property described therein, and for the further reason that mortgagee failed to retain possession thereof and that no possession was ever taken by Pavlovich, such as is contemplated by the statute.

The transfer might be sustained between Sam Vlik and Pavlovich, but as between the creditors of Sam Vlik & Co. and Pavlovich it is not sufficiently removed from the class of sales denounced by the statute as fraudulent.

WHEREFORE, the Plaintiff in Error prays that the judgment be reversed and that the lower Court be directed to render judgment in favor of the defendant.

Respectfully submitted,

McGOWAN & CLARK,

Attorneys for Plaintiff in Error.

Dated Fairbanks, Alaska,

August 29th, 1914.